Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1815

WILLIE MAE PAYNE, *et al.*, *Petitioners,*

v.

TRAVENOL LABORATORIES, INC., *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

On January 6, 1978, the United States Court of Appeals for the Fifth Circuit issued a unanimous decision reversing in part and affirming in part an award of injunctive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Circuit Judge Roney's opinion, in which Circuit Judges Thornberry and Ainsworth joined, vacated as unduly vague that portion of the injunction which generally commanded respondents to obey the law. Also vacated was a portion of the injunction prohibiting use of a tenth grade education or equivalency requirement for hiring. The court determined that none of the petitioners had standing to challenge this requirement. The court affirmed prohibitions against use of twelfth grade and college degree requirements.

Petitioners filed a petition for rehearing and suggestions for rehearing en banc on January 17, 1978. They challenged the court's conclusion with respect to standing. Conceding that all the named plaintiffs had tenth grade or better educations or equivalencies when the suit was filed, petitioners asserted that, at the time of filing, at least one named plaintiff had a valid back pay claim based on the tenth grade requirement. The court unanimously denied the petition on March 23, 1978.

Petitioner Willie May Payne commenced an action against respondents on March 2, 1972. She had obtained a tenth grade equivalency certificate on January 19, 1970. Subsequent to receipt of the certificate, she applied for employment with respondents and was rejected. She filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on January 29, 1970. Although she testified that she had begun applying for employment at respondent's facility in 1967 or 1968, the

record contains no evidence as to if, or when, she applied between 1968 and the date she obtained her tenth grade certificate.

Petitioner Delilah Cherry intervened in this action in 1973, at which time she was not employed at respondents' facility. Ms. Cherry received a tenth grade equivalency certificate in 1967. In her complaint, she alleged that she first applied for employment with respondents after receiving her certificate and was rejected. At trial, she testified that she first applied to respondents in 1965 or 1966. Ms. Cherry filed a charge with the EEOC on August 15, 1970.

THE WRIT SHOULD NOT BE GRANTED

The decision of the Court of Appeals to vacate the injunction against respondents' tenth grade requirement is unremarkable, to say the least. It is based on the simple principle that parties lack standing to challenge practices which never could and never will cause them any injury. Petitioners plainly failed to demonstrate that they had been harmed by the tenth grade requirement within the relevant periods of limitation.

Petitioners offer three grounds for granting a writ of certiorari. First, they contend that the Court of Appeals refused to recognize past injury as grounds for standing and ignored decisions of this Court and other Courts of Appeals. Second, they contend that the Court of Appeals used the class definition to deprive them of standing. Finally, they contend that the Court of Appeals' decision will inhibit private enforcement of the civil rights laws. Each of petitioners' grounds has no validity, unless the record below is ignored or distorted.

The Court of Appeals and District Court are in agreement on all material questions of fact. For this Court to review the record once more would be wasteful and an improper use of certiorari. All the purported conflicts with other precedents, all the purported departures from established practice, and all the purported inhibitions against private litigants depend for their existence on a rejection of the facts as interpreted by the District Court and the Court of Appeals.

A. The Court of Appeals' Decision On Standing Is Grounded On The Finding That Petitioners Failed To Demonstrate Injury In Fact.

1. Petitioners Failed To Establish Direct Injury From The Tenth Grade Requirement.

The Court of Appeals denied petitioners standing because they failed to demonstrate injury in fact. App. 3a-4a.[1] That Article III standing is predicated on "injury in fact" can hardly be disputed. This Court clearly articulated that standard in *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975); *see Regents of the University of California* v. *Bakke*, ___ U.S. ___, ___ n.14, 46 U.S.L.W. 4896, 4899 n.14 (1978) (Powell, J.). And in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), this Court held that a plaintiff cannot, either as an individual or as a class representative, attack an employment practice which has not injured or could not injure him or her.

Petitioners' suggestion that they suffered actual injury from the tenth grade requirement prior to obtaining their tenth grade certificates is inconsistent with the record. Petitioners simply failed to show that they applied for

[1] Citations to Petitioners' appendix are designated "App. ."

employment during the relevant limitations periods while lacking tenth grade certificates.

In order to state a cause of action under Title VII based on the tenth grade requirement, petitioners had to show that they were rejected because of the requirement within 90 days of filing a charge with the Equal Employment Opportunity Commission. Civil Rights Act of 1964, § 706(e), 78 Stat. 259 (1964).[2] This is a jurisdictional prerequisite to establishing a cause of action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Since Ms. Payne obtained a tenth grade equivalency certificate on January 19, 1970 and filed an EEOC charge on January 29, 1970, she had to prove that she applied for employment between November 1, 1969 and January 19, 1970. She failed to do so.[3] As stated by the Court of Appeals,

> Plaintiffs also attempt to establish standing by noting that during at least 80 of the 90 days preceding the January [29], 1970, filing of plaintiff Willie Mae Payne's first EEOC charge, she failed to satisfy the tenth grade education requirement. No evidence appears in the record to suggest that Ms. Payne applied for employment during this 80-day period.

[2] In 1972, the Act was amended to extend the limitations period to 180 days. This amendment has no impact on petitioners' claims. 42 U.S.C. § 2000e-5(e).

[3] Petitioners' suggestion that Title VII claims are kept alive by the Mississippi back pay statute of limitations is completely at odds with the Act. See Petition For A Writ Of Certiorari, at 15-16. The statute clearly requires the filing of a charge within the time prescribed in section 706(e) to have a valid cause of action. Whether, once a valid claim is proven, a plaintiff may be awarded back pay for a continuing violation extending beyond the 90 day period is a wholly distinct question. Petitioners cannot use a remedy provision to bootstrap jurisdiction for a lapsed claim.

App. 5a.[4]

> This finding is in accordance with the findings of the District Court. The District Court stated,
>
> > There was some controversy as to when Ms. Payne initially applied for employment at the Baxter plant; however, the parties have stipulated that she did so at least as early as March 17, 1970.

App. 33a-34a.[5]

Petitioner Cherry similarly could not prove to have applied during any Title VII limitations period. She obtained her tenth grade certificate in 1967, years before she or Ms. Payne filed charges with the EEOC.

The Civil Rights Act of 1866, 42 U.S.C. § 1981, unlike Title VII, does not expressly incorporate a limitations period. The limitations period employed is that in the limitations statute of the forum state applying to analogous actions. In Mississippi, that limitations period, at the time the complaint in this case was filed, was three years. *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 & n.49 (5th Cir. 1974). Since the complaint was filed on March 2, 1972, petitioners had to prove that

[4] The slip opinion, reproduced in the appendix, contains a typographical error that Ms. Paynes' charge was filed on January 19, 1970. The correct date of January 29 appears in the printed opinion. Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 899 (5th Cir. 1978).

[5] If petitioners regarded the District Court's finding to be incorrect or inadequate, they had the opportunity to request a new finding. The District Court specifically invited such requests. Order of February 19, 1976, ¶4(d), App. 68a. Yet petitioners, although requesting numerous other findings, never asked for an additional finding concerning Payne's application history with respondents. See Plaintiffs' Requests For Specific Findings of Fact, Conclusions of Laws, and Rulings on Remaining Issues (March 15, 1976).

they applied for employment while unable to meet the tenth grade requirement after March 2, 1969. Ms. Cherry, having obtained a tenth grade certificate in 1967, cannot possibly have such a claim. Ms. Payne, as the above review of the record makes clear, failed to prove a specific application between March 2, 1969 and January 19, 1970.

Petitioners' suggestion that a six year statute of limitations applies to actions under 42 U.S.C. § 1981 for injunctive relief is wholly inapposite. Since both petitioners were capable of meeting the tenth grade requirement when the complaint was filed, they could not possibly have obtained an injunction against prospective use of the requirement. If they had claims at all, they were for back pay only. Moreover, the lone District Court opinion relied on by petitioners for the proposition that the statute of limitations for injunctive actions under section 1981 differs from the statute for back pay actions appears flatly inconsistent with the Court of Appeals holding in *Johnson* v. *Goodyear Tire & Rubber Co.*, supra.

Petitioners also erroneously contend that the Court of Appeals substituted the class cut off date for the relevant limitations dates under Title VII and 42 U.S.C. § 1981. Petitioners can make this contention only by using a quotation from the Court of Appeals' opinion taken completely out of context. *See Petition for a Writ of Certiorari,* at 18.

When the Court of Appeals' reference to the class cut off date is viewed in context, it becomes clear that the court used the date only with reference to claims petitioners asserted they had as class members, rather than as individuals. Petitioners, effectively conceding their failure of proof, argued that under *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), they did

not have to show at trial that they actually applied to respondents to be eligible for a back pay award. Instead, they suggested that they could come forward after trial and make the showing required by *Teamsters* as members of the class. The Court of Appeals correctly observed, however, that the class definition excluded claims arising before March 3, 1970. This was not, as petitioners contend, an extinguishment of any claim. Nor was it a holding that petitioners had less right to recover back pay because they represented a class. Indeed, it was only because they represented a class that petitioners were able to make their novel suggestion that they possessed greater rights as class members than as individuals. Petitioners had a full opportunity to present their individual claims at trial. Any rights *Teamsters* may afford them as members of a class cannot be larger than the rights they possessed as individuals.

The conclusion that petitioners failed to prove that they applied to respondents during the relevant limitations periods is inescapable. This failure of proof, moreover, occurred in a context in which respondents had attacked petitioners' standing generally in their Answer to the Complaint and Ms. Payne's standing as to the tenth grade requirement specifically in an early motion filed almost three years prior to trial. *Answer* (April 26, 1972); *Motion to Define and Limit the Class* (June 26, 1972); *Memorandum of Points and Authorities In Support of Motion to Define and Limit the Class* (June 26, 1972).

The Court of Appeals had the record before it. The relevant portions were illuminated by the parties' briefs and the decision of the District Court and were reargued to the court when petitioners requested rehearing. Further review of the record will be of no avail to petitioners, but

will only forestall the consequences of their inadequate evidentiary showing at trial.

2. Petitioners Did Not Suffer Indirect Injury From the Tenth Grade Requirement.

Petitioners do not possess the indirect injury from the tenth grade requirement that was recognized by this Court in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). Because they were not employed by respondents when the complaint was filed, they suffered no impact from the composition of respondents' work force. By contrast, the plaintiffs in *Trafficante* were actually residents of an apartment complex allegedly restricted to whites by the defendant. Similarly, in each Court of Appeals case cited by petitioners, the plaintiffs were actually employed by the defendant when they filed their complaints. *See EEOC* v. *Bailey Co.*, 563 F.2d 439 (6th Cir. 1977), *cert. denied*, ___ U.S. ___, 46 U.S.L.W. 3555 (1978);[6] *Waters* v. *Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977); *Gray* v. *Greyhound Lines, East*, 545 F.2d 169 (D.C.Cir. 1976).

The plaintiffs in *Trafficante* and the other cases cited by petitioners all had direct daily contact with an atmosphere influenced by the defendants. Thus, they had standing. Petitioners were removed from respondents' work force. They could not base standing on their contact with it.

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[6] EEOC v. Bailey Co. further differs in that the EEOC, not the charging employee, eventually initiated suit. Under Title VII, the EEOC could have launched its own investigation and civil action without any employee charge.

B. The Court Of Appeals Did Not Use The Class Termination Date To Deprive Petitioners Of Standing.

Petitioner's contention that the class termination date was improperly used merely recapitulates part of their earlier argument concerning standing. As noted above, the Court of Appeals relied on the class definition only to the extent petitioners attempted to assert standing as class members.

Perhaps the best illustration of the fact that the Court of Appeals did not use the March 3, 1970 class cut-off date to determine petitioners' individual standing is the quotation set forth at page 4 of this Brief. It shows — beyond dispute—that the Court of Appeals specifically addressed the ninety-day period prior to January 29, 1970.

C. The Court Of Appeals Has Not Improperly Restricted Access To the Courts.

To state that the Court of Appeals has restricted access to the courts is to ignore the doctrine of standing. Obviously, a requirement that plaintiffs demonstrate injury in fact will decrease the number of lawsuits heard by the judiciary. But that is what the Constitution requires.

In addition, the Court of Appeals has not inhibited enforcement of Title VII. Those individuals truly injured by the tenth grade requirement are free to attack it. If the requirement is illegal, such an attack can fully vindicate all victims' rights. To bar from court individuals who were not in the past and will not in the future be harmed by an employment practice is not to prevent enforcement of the civil rights laws. It is to uphold Article III of the Constitution.

Finally, the Court of Appeals' opinion puts no one to the "harsh choice" of remaining unemployable or losing standing. Petitioners were not denied standing because they obtained tenth grade certificates. They were denied standing because they failed to prove they applied to respondents within the relevant limitations periods while they lacked certificates. It was not the fact that they obtained certificates that deprived them of standing. It was their failure to prove that they in fact applied for employment within the period of limitations prior to obtaining the certificates.

CONCLUSION

The opinion of the Court of Appeals is correct in all respects and is altogether unexceptional. It is in complete harmony with the decisions of this Court and of other Courts of Appeals. Petitioners' contentions are all based on a rejection of the facts as interpreted by both the Court of Appeals and the District Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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